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No. 88-305

In The
Supreme Court of the United States
October Term, 1988

SOUTH CAROLINA,

Petitioner,

v.

GATHERS,

Respondent.

**ON WRIT OF CERTIORARI TO
THE SOUTH CAROLINA SUPREME COURT**

**MOTION FOR PERMISSION TO FILE BRIEF AMICUS
CURIAE AND BRIEF AMICUS CURIAE
FOR THE CENTER FOR CIVIL RIGHTS
AND THE STOP! THE MADNESS FOUNDATION
IN SUPPORT OF PETITIONER**

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Applicants Landmark Legal Foundation Center for Civil Rights and the Stop! the Madness Foundation request permission to file an *amicus curiae* brief in support of Petitioner, based on the following:

1. Landmark Legal Foundation Center for Civil Rights is a public interest law center that litigates in support of fundamental individual rights, including freedom from crime. Stop! the Madness Foundation is an

educational organization that promotes the rights of crime victims and helps raise public consciousness against crime.

2. Our brief will supplement the arguments of the parties by focusing on the rights of crime victims, who are not parties to this litigation but whose interests are directly impacted by the questions of law at issue in this case.

For the foregoing reasons, applicants request permission for leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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Dated: December 2, 1988

Movants requested permission to file from petitioner and respondent, which consent was granted by petitioner but withheld by respondent.

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INTEREST OF AMICI

The Landmark Legal Foundation Center for Civil Rights is a public interest law center dedicated to promoting the core values of civil rights: equality under law and fundamental individual rights. A major component of this mission is the freedom from crime, which is the most fundamental of civil rights.

The Stop! the Madness Foundation is a nonprofit charitable organization engaged in a variety of education

efforts related to the eradication of crime and promotion of the rights of crime victims.

SUMMARY OF ARGUMENT

In *Booth v. Maryland*, ___ U.S. ___, 107 S. Ct. 2539 (1987), this Court invalidated the use of Victim Impact Statements in capital sentence hearings. This case presents an opportunity to revisit that decision.

Booth was wrongly decided for several reasons. First, it fails to take into account the civil rights of crime victims, which Victim Impact Statements serve to vindicate. Second, *Booth* contravenes the American legal tradition and public policy reflected in the statutes of a majority of states and the federal government, which provide for victim participation in sentencing decisions. Finally, *Booth* creates unnecessary conflicts in sentencing rules and unduly restricts the discretion of trial courts. The concerns raised by the majority can be ameliorated through ordinary procedural precautions. Given the vital interests at stake, the Court should correct its error in *Booth* and sustain the use of Victim Impact Statements, with appropriate procedural safeguards, in capital sentencing deliberations.

ARGUMENT

I. VICTIM IMPACT STATEMENTS ARE AN EXPRESSION OF THE MOST FUNDAMENTAL OF CIVIL RIGHTS

Booth v. Maryland was wrongly decided primarily because it focused solely on the rights of criminals and

overlooked completely the civil rights of crime victims. The Constitution does not compel the courts to protect one set of rights to the exclusion of the other.

A "Victim Impact Statement" serves the important purpose of ensuring that the civil rights of crime victims are factored into the sentencing process. It reflects the fact that criminal prosecutions implicate the interests not only of criminal defendants and of society, but also of individual victims, and it provides a mechanism by which those interests may be taken into account and ultimately vindicated.

In a nation grounded in natural law, a system of justice exists to give protection to the fundamental rights of life, liberty, and the pursuit of happiness, rights that cannot adequately be protected in a state of nature. The right to life, of course, is the essential prerequisite to the other fundamental rights of man; and it is the protection of the individual's personal security that is the state's primary purpose. See generally, J. Locke, *Second Treatise of Government* (1698).

Accordingly, freedom from crime has traditionally comprised a major focus of the quest for civil rights in America. In 1948, the United States Committee on Civil Rights identified four fundamental civil rights for which protections were inadequate: the right to safety and security, to citizenship and its privileges, to freedom of conscience and expression, and to equality of opportunity. See Committee on Civil Rights, *To Secure These Rights* (1948). Forty years later, we have made enormous strides in protecting three of these four basic rights of Americans

– but not freedom from crime. And a vastly disproportionate burden of that failure falls on the shoulders of the least fortunate members of society, especially minorities and the poor. See C. Bolick, *Changing Course: Civil Rights at the Crossroads* 116-118 (1988).

The Victim Impact Statement gives voice to these rights. In this case, it does so in the context of the most heinous possible violation of civil rights: the taking of a human life. To deprive the victim and his survivors a role in the sentencing process in such cases is thereby to ignore the most fundamental of civil rights.

This Court's decision here should thus be informed not only by the constitutional protections accorded to criminals and criminal defendants, but also by the spirit of individual liberty in which the Constitution was written – and at whose core lies the right to personal security.

II. THE USE OF VICTIM IMPACT STATEMENTS IN CAPITAL SENTENCING IS CONSTITUTIONAL

A. Statements of victim impact are proper factors to be considered when determining a "defendant's responsibility and moral guilt."

The *Booth* majority held that in determining the validity of sentencing procedures, the challenged evidence "must be scrutinized to ensure that the evidence has some bearing on the defendant's 'personal responsibility and moral guilt,'" *Booth v. Maryland*, ___ U.S. ___, 107 S. Ct. at 2533 (1987) (citing *Enmund v. Florida*, 458 U.S. 782, 801 (1982)). The majority went on to hold that Victim Impact Statements do not fall within this criterion since "the focus of a VIS . . . is not on the defendant, but on the

character and reputation of the victim and the effect on his family." *Booth*, 107 S. Ct. at 2534.

This view is in conflict with the American legal tradition, which has consistently embraced the view that the impact of crime on victims is indeed relevant to a criminal's culpability. As outlined below, victim impact has served historically as an important consideration in sentencing decisions. Public policy considerations reinforce the importance of victim participation in sentencing decisions, and these policy considerations have been ratified by a vast majority of states, which have enacted laws providing for the use of Victim Impact Statements in sentencing decisions. We urge this Court not to lightly set aside this vitally important protection of victims' rights.

1. Victim participation in the criminal justice process is deeply embedded in our legal tradition. The pre-colonial English system of criminal prosecution was a private process, with the victim or victim's family directly bringing a case against the criminal offender. The victim was required to pay the costs of prosecuting the case, which included payments of trial costs to the justice of the peace. See E. Zeigenhagen, *Victims, Crime, and Social Control* 63-64 (1977). This system of private prosecution produced inequities that were recognized during the late 18th and early 19th centuries in the United States. As one commentator notes, "Under a system of private prosecution, the prosecution of criminal offenses depends upon the ability and willingness of the victim or other interested individuals to bring prosecution, which the poor and powerless are less able and willing to do. Accordingly, one of the reasons for establishing the office of public prosecutor might have been to obtain redress

for crimes committed against them or their property." Carrington and Nicholson, *The Victim's Movement: An Idea Whose Time Has Come*, 11 PEPPERDINE L. REV. 1, 130(1984)(citing 1 J. Stephen, *A History of the Criminal Law of England* 493-503 (1883)).

As the role of prosecutor gradually evolved from a private to a public function, the close-knit communities during this period produced juries familiar with the circumstances of the particular crime, including the crime's effect on the victims and their families. While the victim did not necessarily play a formal role in sentencing determinations, the fact that information was easily shared within entire communities meant that few sentencing decisions were made without knowledge of the effect of the crime on the victim and the victim's family.

With the emergence of large urban communities, the docket of most criminal courts expanded and criminal justice became more institutionalized, leading to courts that were increasingly detached from the individuals who were directly impacted by the crime at issue. But at the same time, the criminal justice system developed in other ways that provided new protections for victims of crime. A growing number of prosecutors were elected rather than appointed, in part to adequately reflect the views and standards of each local community. The practice of individual sentencing gradually replaced statutory fixed sentencing, allowing punishment to "fit the offender and not merely the crime." *Williams v. New York*, 337 U.S. 241, 247 (1948); see also Posner, *Victim Impact Statements and Restitution: Making the Punishment Fit the Victim*, 50 BROOKLYN L. REV. 301, 304 (1984).

Thus, we see in the roots of American jurisprudence the foundation for victim involvement in criminal proceedings. Early reforms occurred not to exclude the victim, but rather to insure that defendants were afforded protection by the criminal justice system while simultaneously recognizing the interests of victims.

In recent decades, however, the growing depersonalization of the criminal justice system has eroded this balance between criminal procedural rights and the interests of crime victims. As a result, most states and the federal government have created new mechanisms to insure victim participation in the prosecution process. In particular, a vast majority of states have enacted "Victim's Bill of Rights" laws providing opportunities for victim participation in the sentencing process. The *Booth* decision cuts against these efforts to safeguard the rights of crime victims – efforts that reflect a concern for victims that is a cornerstone of American criminal jurisprudence.

2. The *Booth* majority also concluded that the contents of Victim Impact Statements "may be wholly unrelated to the blameworthiness of a particular defendant." *Booth*, 107 S.Ct. at 2534. The majority does not explain in detail the reasoning behind this view, nor does it explain why victim-related factors may be relevant to other types of sentencing decisions but not to capital sentencing decisions. And although the majority would require "individualized determination[s]" in sentencing based on the "'character of the individual and the circumstances of the crime,'" *Booth*, 107 S. Ct. at 2532 (citing *Zant v. Stephens*, 462 U.S. 862, 879 (1983)), the majority does explain why the effects of the murderer's act do not fall within the "circumstances of the crime."

In reality, as Chief Justice Rehnquist observed in *Zant v. Stephens*, *id.* at 900 (Rehnquist, J., concurring), the circumstances of the crime are relevant in two discrete facets of the criminal prosecution: proof of guilt and sentencing. Victim impact is relevant in the second phase, in which the sentencing jury "does not attempt to decide whether particular elements have been proved, but instead makes a unique, individualized judgment regarding the punishment that a particular person deserves." *Id.* at 900 (Rehnquist, J., concurring).

Victim Impact Statements are relevant to this inquiry. As Justice White observes,

There is nothing aberrant in a juror's inclination to hold a murderer accountable not only for his internal disposition in committing the crime but also for the full extent of the harm he caused; many if not most persons would also agree, for example, that if someone who drove his car recklessly through a stoplight and unintentionally killed a pedestrian merits significantly more punishment than someone who drove his car recklessly through the same stoplight at a time when no pedestrian was there to be hit.

Booth, 107 S.Ct. at 2504 (White, J., dissenting).

Public policy considerations broadly support the proposition that the effect of crime on victims is indeed a valid and essential factor in sentencing determinations, as demonstrated by the adoption by a majority of states of "Victim's Bill of Rights" statutes that mandate the inclusion of victim impact evidence in sentencing proceedings.¹ Congress has also passed a similar statute

¹ The states include Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, (Continued on following page)

requiring consideration of victim impact in sentencing decisions. See 18 U.S.C. 3580. As Justice White noted in his *Booth* dissent, 107 S.Ct. at 2539 (White, J., dissenting), "[D]eterminations of appropriate sentencing considerations are 'peculiarly questions of legislative policy,' - determinations that reflect important public interest considerations that this Court should not lightly set aside.

3. The *Booth* decision also creates a conflicting set of standards to govern evidence pertaining to victims in sentencing proceedings. First, it creates a single context in which a specific type of relevant evidence, admissible in other contexts, may not be used. For instance, victim-related considerations are taken into account in determining what types of conduct constitute capital offenses. "Special circumstances" statutes, for example, call for enhanced sentences where the victim is within a particular class (e.g., police officers, racially or politically motivated crimes, sex offenses). In such cases, this information is presented to the jury or judge to support requests for enhanced sentencing.

Moreover, this Court has upheld the use of information relating to the victim and to the impact of the crime at issue where they might aid the criminal defendant, such as in mitigation of crime. "It is well settled that the Government has the obligation to turn over evidence in

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Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and West Virginia. See Sharman, *Victim Impact Statements and the Eighth Amendment*, 11 HARV. J. OF LAW AND PUBLIC POLICY 583, 591 n.42 (1987); Carington and Nicholson, *supra*, at 175-173 n.175-176.

its possession that is both favorable to the accused and material to guilt or punishment." *Pennsylvania v. Ritchie*, ___ U.S. ___, 107 S. Ct. 989, 1001 (1987) (emphasis added). The Court has also held that "the Eighth and Fourteenth Amendments require that the sentencer [in a capital case] not be precluded from considering, as a mitigating factor, . . . any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *California v. Ramos*, 463 U.S. 992, 1001 (1983) (emphasis added). Yet the *Booth* majority would prohibit the same types of relevant information from being used where it would underscore the gravity or impact of the crime.

This distinction is illogical. As Justice White correctly observes, "the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in." *Booth*, 107 S. Ct. at 2540 (White, J., dissenting) (citing *Eddings v. Oklahoma*, 455 U.S. 104 (1982)). He explains that "just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Id.* at 2540. Likewise, Justice Scalia assailed this distinction in his *Booth* dissent, *id.* at 2542 (Scalia, J., dissenting):

To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring, as we do today, that evidence of much of the human suffering the defendant has inflicted be suppressed, is in effect to proscribe a debate of the appropriateness of the capital penalty with one side muted. If that penalty is constitutional, as we have repeatedly said it is, it seems to me not remotely unconstitutional to permit

both the pros and the cons in the particular case to be heard.

Additionally, *Booth* creates a dichotomy between the rights of victims of capital and non-capital offenses. Even though the families of murder victims often suffer the most horrific losses, the holding of *Booth* precludes such families from submitting Victim Impact Statements while allowing victims of even minor crimes to participate in sentencing hearings. Moreover, since the impact of the crime on the victim or victim's family provides the measure of appropriate compensation for restitution purposes, the exclusion of Victim Impact Statements in this context could preclude restitution in the very cases in which the loss is greatest. Overturning *Booth* would remove these conflicts by restoring to juries the ability to consider all relevant evidence in assessing a criminal's moral culpability.

B. Sentencing courts should possess broad discretion in making sentencing determinations.

In making capital sentencing decisions, while "a jury's discretion to impose the death sentence must be 'suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action'" *Booth*, 107 S. Ct. at 2432 (citing *Gregg v. Georgia*, 428 U.S. at 189 (Opinion of Stewart, J.)), trial courts are nonetheless properly accorded broad discretion to include in sentencing decisions such evidence as they deem relevant to the proceedings. As this Court observed in *Williams v. New York*, 337 U.S. at 246,

[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the source and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by laws.

Accordingly, the trial judge has broad discretion to consider a wide range of information in arriving at the sentencing decision. *Wasman v. United States*, 468 U.S. 559 (1984); *United States v. Givens*, 767 F.2d 574 (9th Cir.), cert. denied, 106 S.Ct. 321 (1985), and in fact may consider information not directly at issue in the criminal charge for which the defendant is being sentenced. *Gregg v. United States*, supra; *Drayton v. People of State of New York*, 556 F.2d 644 (2d Cir.), cert. denied, 434 U.S. 958 (1977). Indeed, in federal sentencing, the limitations of the Federal Rules of Evidence are not applied to sentencing procedures. FED. R. EVID. 1101(d)(3). See 18 U.S.C. 3577. As this Court observed in *Gregg*, 394 U.S. at 492, "There are no formal limitations on [the] contents [of presentence reports], and they may rely on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged."

The prohibition against Victim Impact Statements in the capital sentencing context is thus a departure from the ordinary discretion appropriately conferred upon trial courts in sentencing matters. This Court acknowledged the importance of this broad discretion, noting that to "deprive sentencing judges of this kind of information would undermine modern penological policies that have been cautiously adopted throughout the nation after careful consideration and experimentation." *Williams*, 337

U.S. at 249-250. Rather than creating an ironclad rule that excludes victim-related considerations in the most heinous of crimes, this Court should defer to the judgment of the trial courts, which are in the best position to make individualized determinations that will strike the proper balance among the rights and interests at stake.

C. The constitutionality of Victim Impact Statements should not turn on incorrect presumptions about the content of the statements.

The crux of the *Booth* majority's disapproval of Victim Impact Statements rests on its erroneous assumptions about the content and effects of these statements on sentencing authorities. The majority mistakenly assumes that such statements are inherently inflammatory and that juries or judges will be unable to place Victim Impact Statements in their proper context.

The majority is incorrect to make an across-the-board assumption that Victim Impact Statements will invariably have an inflammatory effect.² The only generalization that can be made about such statements is that they place before the trier of fact information about the magnitude of the criminal offense. In fact, the body of scholarship on

² Indeed, it is interesting to ponder what effect *Booth's* sweeping rule would have on Victim Impact Statements of family members who, for moral or religious grounds, might request that the death sentence *not* be imposed. See, e.g., *Regina v. Hardy*, 29 C.C.C. (2d) 84, 33 C.R.N.S. 76 (Que. S.C. 1976) (victim's family urged leniency in sentencing).

jury reactions to victim statements indicates that no clear relationship exists between the use of these statements and harsher sentencing decisions. A preliminary study of jurisdictions with victim impact laws concluded that, with the exception of Ohio, sentences did not increase when victim impact statements were introduced. Hudson, *The Crime Victim and the Criminal Justice System*, 11 PEPPERDINE L. REV. 23, 52 (1984). Another study indicates that victims generally concur with the Prosecutors' recommendations for disposition. Heinz and Kerstetter, *Pre-trial-Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 LAW & SOC'Y REV. 349 (1979); and in many cases, the interest of the victim lies in securing restitution rather than in attempting to affect sentencing. Kelly, *Victims*, 34 WAYNE L. REV. 69, 74 n.26 (1986).

This Court can guard against any misuse of Victim Impact Statements by setting forth procedural guidelines in appropriate factual contexts. Until such guidance is rendered, trial courts will surely apply the same safeguards that govern other types of potentially inflammatory or controversial evidence. Like any other evidence, Victim Impact Statements can be explained and limited through admonitions, jury instructions, and special verdict questionnaires.

The *Booth* majority also raises concerns about the defendant's ability to rebut the Victim Impact Statement, suggesting that "it would be difficult - if not impossible - to provide a fair opportunity to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant." *Booth*, 107 S.Ct. at 2535. However, neither *Booth* nor *Gathers* presents a situation in which the defense was not free to attempt to rebut or mitigate the

issues raised in the context of victim evidence. Again, jury instructions and the supervised use of victim evidence should be sufficient in most cases to ensure that the jury is properly instructed and focused. Certainly no bar exists to the use by the defense of victim-related information to rebut the Victim Impact Statement.

To create an across-the-board prohibition against Victim Impact Statements on the basis of manageable procedural concerns is to literally throw out the baby with the bathwater. The President's Task Force on Victims addressed this concern in its final report to President Reagan in 1982:

The . . . argument is that participation by victims at sentencing will place improper pressure on judges. The duty of a judge is to dispense justice, and the passing of judgment is a difficult task. The difficulty of the task should not be relieved, however, by discharging it unfairly. Hearing from the defendant and his family and looking into the face of his children while passing sentence is not easy, but no one could responsibly suggest that the defendant be denied his right to be heard or suffer a sentence imposed in secret in order to spare the judge. The victim, no less than the defendant, has a real and personal interest in seeing the imposition of a just penalty. The goal of victim participation is not to pressure justice, but to aid in its attainment. The judge cannot take a balanced view if his information is acquired from only one side.

President's Task Force on Victims of Crime 78 (1982).

In sum, the concerns expressed by the *Booth* majority can be ameliorated through ordinary procedural steps far less sweeping than an outright proscription of Victim

Impact Statements. Such an outcome would be far preferable to the anomalous status quo created by *Booth*, in which all relevant evidence is admissible if it benefits a convicted criminal, but in which the same relevant evidence is excluded if it advances the interests of that criminal's victim – the very person for whose ultimate benefit our system of laws ostensibly exists. The better rule is to ask whether in a particular case the admission of victim-impact evidence serves the ends of justice – a decision appropriately entrusted by our criminal justice system to the judge and jury.

CONCLUSION

For the foregoing reasons, we urge the Court to overrule *Booth* and to reverse the decision of the court below.

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